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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1970

LEONARD J. KEENE,

Petitioner, **1518**

vs.

JACKSON COUNTY, OREGON, a political subdivision of the State of Oregon, and the STATE OF OREGON

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OREGON

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The petitioner, Leonard J. Keene, prays that a Writ of Certiorari issue to review the opinion and judgment of the Court of Appeals of the State of Oregon rendered in these proceedings on October 2, 1970.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of Oregon, 91 Or. Adv. Sh. 493, 474 P.2d 777, as yet unreported in the official reporter, appears at Appendix A, *infra*, pp. 8 - 11.

The order of the Supreme Court of the State of Oregon, denying review of the judgment of said Court of Appeals, with the dissenting opinion of O'Connell, C.J., 91 Or. Adv. Sh. 1385, 478 P.2d 393, which order was entered on December 31, 1970, is as yet unreported in the official reporter, and appears at Appendix B, pp. 12 - 13.

The opinion of the Circuit Court of the State of Oregon for the County of Jackson, sustaining the demurrer of defendants to plaintiff's complaint is unreported and appears at Appendix C, pp. 14-17.

JURISDICTION

The Order of the Supreme Court of the State of Oregon denying petition for review was entered on December 31, 1970. This petition for certiorari was filed less than ninety (90) days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3).

QUESTIONS PRESENTED

The plaintiff, an attorney, brought an action against the State of Oregon and Jackson County, a subdivision thereof, to recover reasonable attorney fees for the representation of an indigent accused of a misdemeanor. The questions thereby arising are:

1. Whether Oregon Revised Statutes, Section 135.330 (1), which authorizes the Court to order payment not to exceed $25.00 as an indigent defendant's attorney fee on a guilty plea and not to exceed $50.00 as attorney fee on a not guilty plea contravenes the Due Process clause of the Fourteenth Amendment to the Constitution of the United States.
2. Whether Oregon Revised Statutes, Section 135.330 (1), which authorizes the Court to order payment not to exceed $25.00 as an indigent defendant's attorney fee on a guilty plea and not to exceed $50.00 as an attorney fee on a not guilty plea contravenes the Equal Protection of the Laws clause of the Fourteenth Amendment to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV, Section 1.

"No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal pro-

tection of the laws."

STATUTORY PROVISIONS INVOLVED

Oregon Revised Statutes, Section 135.320.

"Court appointment of counsel; waiver. If upon arraignment of a person accused in the circuit court of a crime against the laws of this State, the person being arraigned appears without counsel, the court having jurisdiction of the case, in accordance with ORS 133.625, shall appoint suitable counsel to represent him unless the person waives counsel and the court approves the waiver."

Oregon Revised Statutes, Section 135.330 (1) (a) and 135.330 (1) (b).

"Appointed counsel's fee; expenses; payment of expenses and fee.

(1) Counsel appointed pursuant to ORS 135.320 shall, if the court so orders, be paid by the county in which the proceeding is had, for the services rendered in conducting the defense, fees as set forth in the following schedule, and the necessary disbursements:

(a) When the accused is charged with a misdemeanor, and a plea of "guilty" is entered, $25.00.

(b) When the accused is charged with a misdemeanor, and a plea of "not guilty" is entered, $50.00 per day of trial, but not exceeding two days in any one case.

STATEMENT OF THE CASE

Plaintiff is an attorney practicing law in Jackson County, Oregon. Pursuant to state statute he was appointed to represent an indigent person accused of committing a misdemeanor. Plaintiff defended the person in the District Court of the State of Oregon and duly filed with that court an affidavit showing six hours expended in the representation of the indigent, which affidavit was accompanied by a motion requesting the court order the County to pay $150.00 as attorney fees.

The State District Court rejected the motion and the sum of $25.00 was authorized and a draft for that amount was delivered to the plaintiff, which draft has not been presented for payment.

Plaintiff brought an action in the Circuit Court of the State of Oregon against the State of Oregon and Jackson County, Oregon, to recover the sum of $150.00 as reasonable attorney fees for the representation of the indigent person. The Circuit Court sustained the demurrers of defendants and dismissed plaintiff's Complaint on the ground that the statute setting the fee schedule permits no fees in excess of the expressed amounts. (A portion of the fee schedule statute provides additional fees for circumstances involving protracted litigation and exceptional circumstances, but none of the parties claim the protracted litigation portion of the statute to be applicable.)

Plaintiff appealed to the Court of Appeals of the State

of Oregon, which court affirmed the Circuit Court on October 2, 1970. Petition for rehearing to the Court of Appeals was duly made and denied on October 29, 1970.

Petition for review was duly made to the Supreme Court of the State of Oregon, which petition was denied on December 31, 1970.

At all levels in the courts of the State of Oregon, plaintiff contended, inter alia, that the statutory fee schedule, insofar as it limits the court's power to set attorney fees in court appointed indigent cases to $25.00 on a guilty plea and $50.00 on a not guilty plea is unconstitutional in that such fees are not reasonable fees and therefore the Due Process clause and the Equal Protection clause of the Fourteenth Amendment to the Constitution of the United States has been infringed.

Although there would seem to be no real issue on the point, the sum of $25.00 on a guilty plea and the sum of $50.00 on a not guilty plea are both grossly inadequate. Minimum Bar Fee Schedule in Oregon for this type of case would be $150.00.

Under the law of the State of Oregon, plaintiff has exhausted his remedies in the Oregon Courts.

REASONS FOR GRANTING THE WRIT

1. *The issue presented is of great public importance.* On the merits we would contend that a system which pays grossly inadequate fees to counsel who are required to serve

results in at least some indigent persons not receiving reasonably adequate representation. Despite the grand tradition of the bar to serve well, some attorneys do not do so when they are not adequately compensated. Those indigent defendants who draw such counsel are denied due process and in addition such persons do not receive the equal protection received by other indigent defendants who are fortunate in drawing industrious counsel or received by persons who have the financial means to retain counsel. When any segment of the public is dependent on the "luck of the draw" for the proper protection of their rights in the criminal courts, the issue is of great importance to the public.

2. The issue is of great importance to the bar. Although the bar cannot be generally considered to be downtrodden and disadvantaged, surely its members are as entitled to the same guaranties of government as the public at large. The practice of forced court appointment with token fees denies each member who is appointed the equal protection of the laws. Moreover such a system is practiced unequally among members of the bar in that the burden is cast unevenly, *Hunter, Slave Labor in the Courts — A Suggested Solution*, 74 Case and Comment 3, 10 (1969).

3. The Federal questions presented herein have not heretofore been determined by this Court. Certiorari was denied in *State v. Dillon*, 346 F.2d 633 (C.A. 9, 1965), cert. den. 382 US 978, 86 S.Ct. 550, 15 L.ed 2d 469, and in a number of

petitions from the courts of the various states.

Respectfully submitted,

WILLIAM A. MANSFIELD

Attorney for Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF OREGON

Department 2

LEONARD J. KEENE,
Appellant

v.

JACKSON COUNTY, OREGON a political subdivision of the State of Oregon, and the STATE OF OREGON,
Respondents.

* * * * *

Appeal from Circuit Court, Jackson County.

James M. Main, Judge.

Argued and submitted September 24, 1970.

William A. Mansfield, Medford, argued the cause and filed the brief for appellant.

J. Bradford Shiley, Jr., Special Assistant to the Attorney General, Salem, argued the cause for respondents. With him on the brief were Lee Johnson, Attorney General, and Jacob B. Tanzer, Solicitor General, Salem.

Before Schwab, Chief Judge and Langtry and Branchfield, Judges.

BRANCHFIELD, J.

Affirmed.

Filed this 2nd day of October, 1970.

JOSEPH A. GUIMOND

Deputy Clerk

BRANCHFIELD, J.

Plaintiff appeals from an order of the circuit court dismissing the plaintiff's complaint against county and state, seeking fees in excess of those provided by statute for plaintiff's services as court-appointed attorney to defend an indigent on a misdemeanor charge in district court.

The part of ORS 135.330 applicable provides that where he is appointed to defend a misdemeanor charge the attorney shall be paid $50 per day for trial, not exceeding two days in any one case. Subsection (1) (f) of the same statute provides that in extraordinary circumstances payment in excess of the limits stated may be allowed if the presiding judge of the circuit court certifies such is necessary to provide fair compensation for protracted representation.

The circuit judge who heard this case stated the facts and the rationale of his decision in a manner upon which we cannot improve:

> "In this case plaintiff who is duly licensed to practice law in the State of Oregon was appointed by the Court to represent an indigent on a misdemeanor criminal charge and was paid $25 for his services pursuant to ORS 135.330. Plaintiff in his complaint seeks to recover the sum of $150 which he alleges to be just compensation for the services that he rendered. The defendants, Jackson County, Oregon, and the State of Oregon, have filed separate demurrers to the plaintiff's complaint in which both defendants allege that plaintiff's complaint does not state a cause of action.
>
> "The parties have filed memoranda in support of their respective positions and in plaintiff's memorandum he cites Article I, Section 10, Section 18 and Section 20 of the Constitution of Oregon and contends that un-

der these sections the defendants cannot demand his services without paying him just compensation therefor. In addition to citing the sections of the Constitution of Oregon the plaintiff cites the 14th Amendment to the Constitution of the United States. The defendants in support of their demurrers have cited three cases decided by our Supreme Court of the State of Oregon, the most recent case being that of State of Oregon v. Apodaca (1969), 87 Adv. Sh. 857. [State v. Apodaca, 252 Or 345, 449 P2d 445 (1969).]

"* * * In the Apodaca case, supra, our Supreme Court re-affirmed its previous decisions and held that attorneys fees should not be awarded in the absence of a statute authorizing such an award and this appears to be the holding in the vast majority of the jurisdictions which have passed upon this question. See 21 ALR 3d 819, 828, 830; United States v. Dillon (USCA 9 Cir., 1965), 346 F. 2d 633; 7 Am. Jur. 2d, Attorneys at Law, Section 207, page 167. Many excellent articles have been written on this subject, one of which is entitled "Slave Labor in Courts" which was written by Robert S. Hunter, former County and Circuit Judge in Illinois for Case and Comment. As indicated in Mr. Hunter's article the incredible increase in criminal cases in the past few years has resulted in a sharp increase in the burden placed on court-appointed attorneys by the courts, especially in small communities where the number of attorneys have not increased along with the increase in the number of criminal cases and what was previously a minor nuisance has now become an awesome burden for these lawyers. Mr. Hunter has entitled his article "Slave Labor" as it is generally considered to be a direct criminal contempt of court punishable by a fine or jail sentence or both for an attorney to refuse to serve at the court's request.

* * * The obligation of attorneys to serve indigents charged with criminal offenses is an ancient and established tradition of the legal profession. An applicant for admission to practice law is deemed to be aware of the obligation to represent indigents for little or no compensation and because of this according to the Dillon case, supra, cannot contend that it is a taking of his services without just compensation.

"** * Plaintiff was compensated in accordance with the applicable Oregon statute and this Court cannot award him more than it is authorized to pay by statute. Plaintiff's complaint seeks to recover more than is authorized by statute and it does not state a cause of action."

Affirmed.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF OREGON

LEONARD J. KEENE,

Appellant,

v.

JACKSON COUNTY, OREGON, a political subdivision of the State of Oregon, and the STATE OF OREGON,

Respondent.

Appeal from Circuit Court, Jackson County.

James M. Main, Judge.

On Petition for Review.

William A. Mansfield, Medford, for Petitioner.

Affirmed by Court of Appeals, October 2, 1970 (91 Adv Sh 493).

Petition denied December 31, 1970.

O'CONNELL, C. J., dissenting.

Filed this 31st day of December, 1970.

JOSEPH A. GUIMOND

Deputy Clerk

O'CONNELL, C. J., dissenting.

I would grant the petition for review in this case. I am of the opinion that neither this court nor the legislature has the constitutional power to require an attorney to defend an indigent unless the attorney is reasonably compensated for his service. I shall not at this time set out the reasons which support this conclusion. See, however, the following references which lend support to my point of view. Johnson and Douglas v. Superior Court, 2 Ariz App 407, 409 P2d 566 (1966), (but see State v. Superior Court, 2 Ariz App 466, 409 P2d 750 (1966)); Hill v. Superior Court, 46 Cal2d 169, 293 P2d 10, 14 (1956) (dissenting opinion); People v. Randolph, 35 Ill2d 24, 219 NE2d 337 (1966), noted 16 DePaul L Rev 499 (1967); Knox County Council v. State ex rel McCormick, 217 Ind 493, 29 NE2d 405 (1940); Ferguson v. Pottawattamie County, 224 Iowa 516, 278 NW 223 (1938); State v. Rush, 46 NJ 399, 217 A2d 441 (1966); Dan v. Smith, 13 Wis 585 (1861); Hunter, Slave Labor in the Courts - A Suggested Solution, 74 Case & Comment 3 (1969); Allison & Hasset, Counsel for the Indigent Defendant, 41 Am Jud Soc'y 100 (1957); Comment, Attorney and Client - Compensation of Indigent's Counsel in Federal Post-Conviction Proceedings, 46 N Car L Rev 379 (1968); Note, 49 Cal L Rev 954 (1961); Note 107 U Pa L Rev 812 (1959); see also Beaney, The Right to Counsel in American Courts 213-216 (1955), and Brownell, Legal Aid in the United States 136-138 (1951). (1951).

APPENDIX C

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF JACKSON

No. 69-1550-L

MEMORANDUM OPINION

LEONARD J. KEENE,
Plaintiff,

vs.

JACKSON COUNTY, OREGON, a political subdivision of the State of Oregon, and THE STATE OF OREGON,
Defendants.

In this case plaintiff who is duly licensed to practice law in the State of Oregon was appointed by the Court to represent an indigent on a misdemeanor criminal charge and was paid $25 for his services pursuant to ORS 135.330. Plaintiff in his complaint seeks to recover the sum of $150 which he alleges to be just compensation for the services that he rendered. The defendants, Jackson County, Oregon, and the State of Oregon, have filed separate demurrers to the plaintiff's complaint in which both defendants allege that plaintiff's complaint does not state a cause of action.

The parties have filed memoranda in support of their respective positions and in plaintiff's memorandum he cites Article I, Section 10, Section 18 and Section 20 of the Constitution of Oregon and contends that under these sections the

defendants cannot demand his services without paying him just compensation therefor. In addition to citing the sections of the Constitution of Oregon the plaintiff cites the 14th Amendment to the Constitution of the United States. The defendants in support of their demurrers have cited three cases decided by our Supreme Court of the State of Oregon, the most recent case being that of State of Oregon v. Apodaca (1969), 87 Adv. Sh. 857.

The petitioner in the Apodaca case, supra, one Mr. Henigson, was appointed as attorney to represent Mr. Apodaca, an indigent, on charges of kidnapping, assault with intent to rape and detention of a child. The petitioner according to the Supreme Court's decision spent 33 days in trial, 8 other days away from his office and in addition thereto 212 hours in trial preparation. The petitioner was allowed the maximum fee as prescribed by ORS 135.330 which at that time amounted to $450 while a special prosecutor who was appointed by the County was paid $5,000 for his services. In the Apodaca case, supra, our Supreme Court re-affirmed its previous decisions and held that attorneys fees should not be awarded in the absence of a statute authorizing such an award and this appears to be the holding in the vast majority of the jurisdictions which have passed upon this question. See 21 ALR 3d 819, 828, 830; United States v. Dillon (USCA 9 Cir., 1965), 346 F. 2d 633; 7 Am. Jur. 2d, Attorneys at Law, Section 207, page 167. Many excellent articles have been written on

this subject, one of which is entitled "Slave Labor in Courts" which was written by Robert S. Hunter, former County and Circuit Judge in Illinois for Case and Comment. As indicated in Mr. Hunter's article the incredible increase in criminal cases in the past few years has resulted in a sharp increase in the burden placed on court-appointed attorneys by the courts, especially in small communities where the number of attorneys have not increased along with the increase in the number of criminal cases and what was previously a minor nuisance has now become an awesome burden for these lawyers. Mr. Hunter has entitled his article "Slave Labor" as it is generally considered to be a direct criminal contempt of court punishable by a fine or jail sentence or both for an attorney to refuse to serve at the court's request. Attached to the United States v. Dillon case, supra, is a portion of a memorandum filed in opposition to the petitioner's request for attorneys fees in which the author traces the commitment of lawyers to serve upon court appointment as far back as fifteenth century England. The Court in that case actually cites a request made as early as 1292 for the appointment of an attorney for poor folk. The obligation of attorneys to serve indigents charged with criminal offenses is an ancient and established tradition of the legal profession. An applicant for admission to practice law is deemed to be aware of the obligation to represent indigents for little or no compensation and because of this according to the Dillon case, supra, cannot contend that it is a taking of

his services without just compensation.

It is pointed out in the appendix to the Dillon case, supra, and in the "Slave Labor" article that statutory fees frequently cover only capital cases. It appears from these articles that the statutory fees allowed in Oregon far exceed those allowed in most states. The authors cite such examples as Kansas and Rhode Island where the statutes allow a maximum of only $10.00 a day in trial. Plaintiff was compensated in accordance with the applicable Oregon statute and this Court cannot award him more than it is authorized to pay by statute. Plaintiff's complaint seeks to recover more than is authorized by statute and it does not state a cause of action.

Counsel for defendants may prepare appropriate orders.

Dated this 25th day of February, 1970.

JAMES M. MAIN

Circuit Judge